

11 USC §523(a)(2)
FRCP 56

First Interstate Bank of Oregon v. Randolph Adv. No. 90-3489-S

In re Randolph Case No. 390-32378-S7

6/14/91 DDS Unpublished

Judge Sullivan granted the bank's motion for summary judgment and ruled that the debt owed to the bank was not dischargeable. The debtor failed to raise any genuine issue of fact for trial. The affidavits submitted by the bank established that the bank relied on the false financial statement and false tax return supplied by the debtor in approving one loan and in renewing two others.

All three loans were non dischargeable. §523(a)(2) is not limited to the new money advanced after the debtor presents false financial statements, but also renders an existing obligation nondischargeable if it is refinanced or renewed in reliance on the false financial information.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	390-32378-S7
ERIC H. RANDOLPH, aka)	
Eric A. Randolph, fka)	Adversary Proceeding No.
Hartmat Prestrel,)	90-3489-S
)	
Debtor,)	MEMORANDUM GRANTING PLAINTIFF'S
)	MOTION FOR SUMMARY JUDGMENT
FIRST INTERSTATE BANK OF)	
OREGON, N.A.,)	
)	
Plaintiff,)	
)	
v.)	
)	
ERIC H. RANDOLPH, aka)	
Eric A. Randolph, fka)	
Hartmat Prestrel,)	
)	
Defendant.)	

After argument on February 27, 1991 and review of further submissions presented by the parties, I will grant summary judgment in favor of First Interstate Bank of Oregon for the following reasons.

First Interstate filed this adversary proceeding to obtain a judgment for the outstanding balance owed on three

loans it made to the debtor, and for a determination that the debt is not dischargeable in bankruptcy. The bank has established the amount debtor owes the bank through the affidavit of Mr. Dennis Nye. The bank also established that it relied on a false financial statement and fraudulent tax return in extending the terms of two of the debtor's loans, and in granting the debtor an additional loan for \$1,550,000. These facts are established by the affidavits and deposition testimony of Mr. Van Orman and Mr. Nye.

The tax returns which the debtor submitted to the bank in connection with obtaining the new loan and extending the other two loans was materially different from the returns he actually filed with the Internal Revenue Service. The 1987 tax return which he submitted to the bank showed he and his wife had an adjusted gross income of \$1,225,806.00. The actual return which the Randolph's filed showed adjusted gross income of (\$267,259.00). The return presented to the bank attributed \$202,618.00 of the Randolphs' income to dividends. The actual return only included \$46.00 in dividend income, indicating that they owned very little stock. The financial statement which Mr. Randolph supplied the bank claimed that he owned stock worth over \$7,000,000.00, which would track the dividend income on the false tax return. The circumstantial evidence provided can only lead to the conclusion that Mr. Randolph created the false documents to be consistent with each other, and supplied them to

the bank with the intent that the bank rely on the false statements in loaning him money and extending his loans which were then due.

The debtor has not filed an affidavit or supplied any evidence to counter the testimony in the affidavits and transcripts of the depositions supplied by plaintiff. To defeat plaintiff's motion, the defendant must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In a civil matter, the Fifth Amendment does not forbid adverse inferences against a party when they refuse to testify in response to probative evidence offered against them. Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

Debtor appears to admit that he supplied the false tax return to the bank, and he is currently serving a prison term for the offense. Debtor asserts that the bank's reliance on the false financial information to renew loans is not enough to render the debts dischargeable. He claims that §523(a)(2) only applies when new money is loaned, and that two of the loans were already made before the defendant supplied the false financial information to the bank. He also tries to raise an issue that perhaps the bank did not rely on the false financial information when it renewed the loans. However, the affidavits and deposition transcripts do not support the debtor's attempts to

twist the testimony of the bank officers.

The legal position urged by the debtor is at best a minority position, and does not even apply in this case because the loans at issue were already in default when they were renewed. The language of the statute clearly states that a discharge under section 727 does not discharge a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ...use of a statement in writing; that is materially false; respecting the debtor's financial condition; on which the creditor to whom the debtor is liable for such credit reasonably relied; and that the debtor caused to be made with intent to deceive. §523(a)(2)(B). The majority and better reasoned view is that a debt which is refinanced in reliance on a materially false financial statement is not dischargeable in chapter 7. In re Gerlach, 897 F.2d 1048, 1051 (10th Cir. 1990), In re Duncan, 123 Bankr. 383 (Bankr. C.D. Ca. 1991).

The bank has established the elements listed above by a preponderance of the evidence, the standard which applies in a case under §523(a)(2). Grogan v. Garner, _____ U.S. _____, 111 S.Ct. 564, 112 L.Ed.2d 570 (1991).

Plaintiff may submit a judgment establishing the amount of the debt Mr. Randolph owes the bank as set forth in Mr. Nye's affidavit, and a determination that the debt is not dischargeable in bankruptcy. Plaintiff may also submit a cost

bill and itemization of attorney fees.

DATED this _____ day of June, 1991.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: James C. Lancaster
William Dickas
Eric H. Randolph
Leon Simson